

1 KIRBY AND HALLEN
2 A Partnership Including
3 A Professional Corporation
4 7717 Friars Road, Suite 250
5 San Diego, California 92108
6 (714) 298-1015

7 Attorneys for Plaintiff

FILED
SEP 9 - 1982
BY L. SCHNEIDER

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN DIEGO

10
11 MCGREGOR SEA & AIR SERVICES
12 (AMERICA) INC., A Delaware
Corporation,

13 Plaintiff,

14 vs.

15 CINEMATRONICS, INCORPORATED,
16 A California Corporation,

17 Defendant.

)
) CASE NO. 491479
)
) POINTS AND AUTHORITIES IN
) OPPOSITION TO APPLICATION
) TO SET ASIDE RIGHT TO
) ATTACH ORDER, QUASH WRIT
) OF ATTACHMENT, AND RELEASE
) ATTACHED PROPERTY
) DATE: SEPTEMBER 9, 1982
) TIME: 3:00 P.M.
) DEPT: 12

18
19 PRELIMINARY STATEMENT

20 Defendant alleges, in its effort to frustrate the
21 legitimate collection efforts of an unpaid creditor, that the
22 Court has been mislead by plaintiff. This allegation is both
23 spurious and erroneous. Defendant identifies plaintiff as a
24 "supplier" when it is well aware that plaintiff operated in the
25 instant matter as a customhouse broker and freight forwarder
26 advancing cash sums on behalf of defendant upon defendant's
27 promise to repay those sums upon presentment. Defendant also
28 incorrectly asserts that plaintiff and defendant have entered

1 into a novation for valuable consideration. This court was not
2 informed that a novation had occurred for the simple reason that
3 no novation did in fact occur. Furthermore, had a novation
4 in fact occurred, the promises underlying it would be totally
5 and completely unenforceable in view of the fact that there was
6 no consideration for the promises allegedly made by plaintiff.
7 As will be more fully set forth in a succeeding paragraph, a
8 promise to pay a portion of a pre-existing debt is legally
9 insufficient consideration for a promise to forbear collection
10 on the entire debt.

11 In response to the allegation that plaintiff has
12 sought to attach more property than is necessary to secure its
13 claim, plaintiff respectfully suggests that it is the burden
14 of defendant to establish that the assets currently under levy
15 of attachment "clearly exceed the amount necessary to satisfy
16 the amount to be secured by the attachment" as provided for in
17 the Code of Civil Procedure.

18 I

19 NO NOVATION OCCURRED IN
20 THE INSTANT CASE.

21 Defendant alleges in this case that there has been a
22 written novation of the contract which is the subject of
23 plaintiff's suit. Defendant apparently refers to several letters
24 attached as exhibits to its application to set aside the writ.
25 Defendant confuses what it believes to be evidence of a written
26 contract with the written contract itself. The letters merely
27 serve as memoranda of the events which occurred on June 29, 1982.
28 They clearly do not constitute a contract of themselves.

1 Plaintiff does not contend that an oral agreement will
2 not operate as a novation assuming the required elements of a
3 novation are present. Plaintiff, on the other hand, contends
4 that the requirements necessary to establish any contract,
5 including a novation, simply are not present in this case.

6 First, a novation requires an intent on the part of
7 both parties to the transaction to discharge the old contract.
8 Blumer v. Madden 128 Cal.App. 22 (1932).) Thus, where one
9 party is indebted to another, and the creditor takes his
10 promissory note for the sum owed, this does not discharge the
11 original debt unless the parties expressly so agree, or unless
12 such intention is clearly indicated. (The Western Fuel Company
13 v. Lewald Company 190 Cal. 25 (1922); Easton v. Ash 18 Cal.2d
14 530 (1941).)

15 A novation is the substitution by agreement of a new
16 obligation for an existing one, with intent to extinguish the
17 latter. (Civ. Code § 1530-1532.) It cannot be seriously
18 contended that McGregor Sea & Air Services (America) Inc. intended
19 to extinguish the obligation of Cinematronics, Incorporated
20 to pay it \$97,807.13 in exchange for an immediate payment of
21 \$10,000 and a promise to "try" to pay the balance within six
22 months if convenient. At the most, defendant might argue that
23 plaintiff agreed to forbear collection efforts on the existing
24 obligation. To forbear collection efforts is not to extinguish
25 an existing debt.

26 A novation requires consideration. Defendant cites
27 the case of Manfre v. Sharp 210 Cal. 479 (1930) for the
28 proposition that consideration for a novation may simply be the

1 release of an old obligation. This citation is not in point.
2 Manfre v. Sharp involves the release of one debtor in exchange
3 for a promise made by a new succeeding debtor. In that case,
4 the court held that the release of the old debtor was sufficient
5 consideration for the new debtor's promise. The case had
6 absolutely nothing to do with whether or not there had been
7 consideration for the creditor's promise to agree to the
8 substitution. The case is clearly inapplicable to the situation
9 involved in the instant litigation. In this case, the question
10 is whether or not there is consideration for the creditor's
11 promise not the debtor's promise. Plaintiff is not seeking to
12 enforce a novation as against defendant, defendant is seeking to
13 assert a novation as against plaintiff. There was no considera-
14 tion for an alleged promise on the part of plaintiff McGregor
15 Sea & Air Services (America) Inc. to forbear its collection
16 efforts. Defendant alleges that the payment of an immediate
17 \$10,000 constitutes consideration for the promise it alleges
18 was made. This is simply not the case.

19 At the point in time when the June 29th meeting
20 occurred, defendant's account, which called for payment upon
21 presentment of invoice, was over thirty days in arrears. A
22 promise to pay \$10,000 immediately was purely and simply a
23 promise to partially satisfy an obligation with which
24 Cinematronics, Incorporated was already burdened. Stated
25 simply, McGregor Sea & Air Services (America) Inc. received
26 absolutely nothing that it was not already lawfully entitled to
27 in consideration for its alleged promise to forbear.

28

1 Under the definition of consideration in Civil Code
2 section 1605, doing or promising to do what one is already
3 legally bound to do cannot be consideration for a promise.
4 (Burner v. American Mining Co. 76 Cal.App. 774 (1926); Pacific
5 Finance Corporation v. First National Bank 4 Cal.2d 47 (1935);
6 General Motors Acceptance Corporation v. Brown 2 Cal.App.2d
7 646 (1934); Grant v. The Aerodraulics Co. 91 Cal.App.2d 68
8 (1949).)

9 On June 29, 1982, defendant was under a pre-existing
10 obligation to pay the plaintiff \$97,807.13, assuming, arguendo,
11 that plaintiff agreed to withhold collection efforts for a
12 period of six months, it received nothing by way of an agree-
13 ment to pay interest or an additional sum of money which would
14 constitute consideration for its alleged promise. The receipt
15 of \$10,000 was simply collection of an amount which was
16 sorely overdue. To suggest that plaintiff should have rejected
17 the tender of this partial payment does not make sense.

18 11

19 IF THE ATTACHMENT LEVY IS
20 EXCESSIVE, DEFENDANT SHOULD
21 INTRODUCE EVIDENCE OF THAT
22 FACT.

23 Defendant alleges that plaintiff has, by attaching
24 all corporate property, exceeded the amount of assets it needs
25 to secure its debt. Plaintiff stands ready and willing to
26 receive evidence from defendant that property under levy of
27 attachment is "clearly sufficient" to secure its claim. The
28 instructions given by this court to the levying officer were
quite explicit. This Court directed the levying officer to

1 attach "all corporate property, or so much thereof as is clearly
2 sufficient to satisfy the amount to be secured by the attachment."
3 The amount was specifically set forth to be \$92,829.01. Once
4 the levying officer determined that he has attached property
5 which is "clearly sufficient to satisfy the amount to be secured,"
6 he has been directed to cease efforts. Plaintiff suggests that
7 it is incumbent upon defendant to prove to the levying officer
8 or this Court that the attachment is "clearly sufficient."

9 Plaintiff respectfully suggests that the circuit
10 boards referenced in defendant's instant application do not
11 meet the standard required. Plaintiff believes that these
12 circuit boards constitute components for an electronic game
13 which defendant has previously indicated is now worthless due
14 to a lack of market interest in the product.

15 III

16 CONCLUSION

17 For the foregoing reasons, plaintiff respectfully
18 requests this Court not set aside its Right to Attach Order,
19 that it not quash the Writ of Attachment, and that it not
20 order the release of the Attachment Levies. Plaintiff
21 respectfully invites this Court to make a determination as to
22 the sufficiency of the property currently under Attachment to
23 secure the claim of McGregor Sea & Air Services (America) Inc.

24 Respectfully submitted,

25 DATED: September 9, 1982

KIRBY AND HALLEN

26
27 By: 

C. BRADLEY HALLEN
28 Attorneys for Plaintiff